IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 5TH DECEMBER 2006 / 14TH AGRAHAYANA 1928

Arb.A.No. 15 of 2003()

AGAINST OP(ARB.)117/2002 of IST ADDL.DISTRICT COURT, ERNAKULAM
.....

APPELLANTS/PETITIONERS IN THE ARB.OP-C1&C2 PARTIES BEFORE THE
---------- ARBITRATOR

1. **JOSEPH SAJEEV, 10/C, PALLADIUM PAVLON APARTMENTS, MARKET ROAD, KOCHI-682 024.**

2. **MRS.DARLY JOSEPH, KALAPPURACKAL HOUSE, EDACOCHIN, KOCHI - 682 006.**

3. **MRS.BEENA BERTIE, KOIPARAMBIL, KAZHUTHUMUTTU JUNCTION, KOCHI-682 005.**

BY ADV. SRI.R.K.VENU NAYAR

RESPONDENTS: RESP.IN THE ARB.OP-B&A PARTIES BEFORE THE ARBITRATOR
---------- AND THE ARBITRATOR

1. **LARSEN & TOUBRO LTD., ECC DIVISION, P.O. BOX NO.979, MOUNT POONAMALLEE ROAD, MANAPPAKKAM, CHENNAI-600 089. REPRESENTED BY SENIOR MANAGER (LEGAL), K.JAGANNATHAN.**

2. **JOSEPH BOBAN, C-239, JALAVAYU VIHAR, KALYAN NAGAR, BANGALORE-560 043 (DIED ON 24-09-2003)**

3. **BLAZE FELIX, 36/1177, KASIM LANE, KOCHI-682 017.**

4. **MRS.ELSIE FELIX, 36/1177, KASIM LANE, KOCHI-682 017.**

5. **SR.PHILOMINA KOODARAPPILLY ST.FRANCIS XAVIER CONVENT, KALOOR, KOCHI 682 017.**

6. JUSTICE K.JOHN MATHEW,
KATTAPPURATH, VEEKSHANAM ROAD,
KOCHI 682 018.

ADDL.RESONDENTS 7 TO 10 LEGAL
REPRESENTATIVES OF DECEASED 2ND RESPONDENT

7. MRS.ANITA BOBAN, C-239, JALAVAYU VIHAR,
KALYAN NAGAR, BANGALORE-560 043.

8. AISWARYA BOBAN, C-239, JALAVAYU VIHAR,
KALYAN NAGAR, BANGALORE - 560 043.

9. ATUL BOBAN, C-239, JALAVAYU VIHAR,
KALYAN NAGAR, BANGALORE-560 043.

10. ASMITHA BOBAN, C-239, JALAVAYU VIHAR,
KALYAN NAGAR, BANGALORE-560 043.
ADDITIONAL RESPONDENTS 8 TO 10 BEING MINORS
REPRESENTED BY THEIR MOTHER MRS.ANITHA BOBAN.

BY ADV. SRI.P.S.DIVAKARAN
SRI.ANIL XAVIER
SRI.ZAKEER HUSSAIN
SRI.N.MANOJ KUMAR
SMT.JAYASREE MANOJ
SRI.ANIL XAVIER
SRI.V.RAJAGOPAL

THIS ARBITRATION APPEALS HAVING BEEN FINALLY HEARD ON 05/12/2006, ALONG WITH Arb.A.No 10/2003, Arb.A.No 17/203 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

J.B.KOSHY & K.PADMANABHAN NAIR, JJ.

Arb. Appeal Nos.10,15 and 17 of 2003

Dated 5th December, 2006

JUDGMENT

Koshy,J.

All these appeals are filed against the common order passed by the District Court, Ernakulam in Arb.O.P.Nos.51 & 117 of 2002. An arbitration award was set aside by the above order. A Memorandum of Understanding was entered into between the owners of the property and the builder for developing the property into a residential complex. The owners included wife, three sons and a daughter of one Felix who originally owned the property. Later two other daughters also joined. At the time when Ext.A1 Memorandum of Understanding was entered into, Rs.10 lakhs was paid by the builder out of Rs.90 lakhs agreed to be paid as adjustable advance. Later, when Ext.A3 Development Agreement was executed, a total extent of 2.36 acres of land was handed over to the builder. Apart from the handing over of possession, Ext.A4 registered General Power of Attorney was also executed by the owners in favour of the builder authorizing the builder to apply and comply with the provisions of statutory legislations, building regulations, enactments and rules and to sign such deeds, documents, forms, declarations, applications, drawings and other papers

necessary and required to obtain sanction. Accordingly the builder submitted building plan for approval and he also paid balance Rs.80 lakhs as adjustable advance. The plan was approved by Ext.C11 Government order with floor area ratio of 1.5. The builder filed a review petition before the Government and a higher floor area ratio was sanctioned as per Ext.C13 Government order dated 7.3.1998 on condition that the building should have a minimum set back of three metres from the proposed road boundary i.e., the existing road should be widened to 10 metres which is on the southern side. So, they have to surrender free of cost land required for widening the road on the southern side to 10 metres. It is the case of the owners that even though they were ready and builder could have surrendered the land, the builder started persuading and pressing the owners to agree for reducing their share of 27.5% built up area in view of the market conditions and thereafter terminated the contract saying that owners were not willing to execute a common surrender agreement, repudiated the contract and demanded return of adjustable advance of Rs.90 lakhs paid. Wife, sister of the wife and two sons did not accept the termination and they wanted specific performance of the contract. One son and two daughters maintained that they were always prepared to co-operate with the builder to execute the project, but, the contract was terminated

illegally and, therefore, they want compensation. In view of order dated 17th February, 2000 in A.R.No.47 of 1999 the matter was referred for arbitration. Justice K.John Mathew, Former Judge of this court, was appointed as the Arbitrator.

2. Considering the contentions raised by various parties, for convenient sake, by consent of all the parties, they were arrayed as `A', `B' and `C' parties. `B' party is the builder. `A' party is the party which insisted on specific performance of contract and also claimed compensation later in view of the failure of specific performance within a reasonable time and `C' party is the party who claimed compensation alone. The builder also raised counter claims saying that they have developed the land and they are entitled to the amount for the reclamation of the land etc. The pleadings were filed. Amendments sought for by the parties were allowed. All parties participated in the arbitration proceedings. Arbitrator held that `A' party is entitled to an award for specific performance and taking into consideration all the facts and circumstances it is a fit case for awarding compensation in substitution of specific performance of the contract and thus awarded compensation. `B' party's (Builder) claim was allowed for filling and levelling the

land. Arbitrator also felt that `C' party's claim for compensation was right, but, with regard to the damages, they are not entitled to higher rate of compensation. Since `A' party was awarded compensation, the same rate of compensation was allowed to `C' party also. The builder filed a petition under Section 34 of the Arbitration and Conciliation Act to set aside the award on various grounds. `C' party filed a petition in so far as the compensation was not correctly computed. The District Judge allowed the petition filed by the `B' party and set aside the arbitration award. Arb.A.No.17 of 2003 is filed by `A' party and Arb.A.No.10 of 2003 is filed by `C' party against the setting aside of the award. Arb.A.No.15 of 2003 is filed by `C' party against the order dismissing their application for re-computation of compensation. These appeals were heard together.

3. Before dealing with the appeals, we will discuss some preliminary questions argued before us. First question is whether there is arbitration clause in the agreement and scope of arbitration agreement. Ext.C4 (equivalent to Ext.A3) is the Development Agreement. Clause 37 of the agreement is as follows:

> "37. All disputes arising out of or in connection with this Agreement shall be resolved by mutual discussions between the parties failing which, such disputes shall be referred to Arbitration. The procedure of arbitration shall be as per the Arbitration & Conciliation Act 1996. This agreement shall be subject to the jurisdiction of Courts at Ernakulam."

The above would show that all disputes in connection with the agreement is referable for arbitration. The owners as well as the builder made separate claims and it was contested by counter claims. Two separate sets of claims were raised by owners and all the disputes were considered by the Arbitrator. After the agreement it is also not disputed that the entire property available with the owners were handed over to the builder and also they executed General Power of Attorney to the builder. The above power of attorney shows that they were given power to deal with the property on behalf of the land owners as Principal. The first clause reads as follows:

> "1. To endorse, sign and execute all sale deeds, conveyance deeds, forms, contracts, declaration and/or such other documents, instruments, writings or deeds in respect of the Schedule Property either in lots and/or in itemised shares thereof in favour of any firm, person/s, body corporate or

> individuals in such manner and for such consideration as may be decided and found expedient by L&T. Also to surrender land to GCDA & Cochin Corporation for widening the road."

So, the General Power of Attorney provides power to surrender land to GCDA and Cochin Corporation for widening the road. The land required for widening the road to comply with Ext.C13 order was also with the builder as possession was already handed over for that part of land. It is true that there were some disputes regarding partition between the owners, but, as far as the builder is concerned, the land owners have no dispute as their issues were common. It is for the builder to get building permit and construct the building as per the agreement. Owners will get only 27.5% of the built-up area and balance can be dealt by the builder. The title deeds were also entrusted to third party to be used by the builder. The contention of the builder mainly was that as per the Government order surrender of the land for widening the road has to be done. Owner did not do and thereby they abandoned their rights and they insisted that work cannot be done unless the owners together are signed, `A' and `C' collectively and not individually. The case of the land owners was that they were never informed of the Government direction to surrender 10 cents of land. Only when the builder's

request for reducing the built-up area to be given to them from 27.5% was not accepted, it was informed to give the consent and the builder was informed that they are ready to give registered power of attorney although notarised power of attorney has already been given as power to surrender the land. The owner of the land was first party of `C' group and he also gave written undertaking that he is ready to co-operate in any manner, but, builder insisted that all the parties should sign collectively and not individually in the form A & B even though that portion of the land was with first party of `C' group. But, the contract was terminated. Taking into account the entire evidence adduced by the parties, Arbitrator as a finding of fact found that the owners were ready and willing to co-operate with the builder but, without any valid reason he has resigned from the contract. With regard to the claim of `A' party even though Arbitrator found that they are entitled to specific performance, in view of the passage of time awarded compensation and compensation was awarded at the same rate to `C' party who insisted that termination of contract was illegal and the builder committed breach and they are entitled to compensation, but, the rate of compensation was given equally.

4. The District Court set aside the award of the Arbitrator on various counts. First ground is that Arbitrator went beyond the jurisdiction. The Arbitrator exceeded the jurisdiction by deciding matters not submitted to arbitration as the questions submitted for arbitration was only of liability and quantum of damages arising out of illegal rescission of contract. Whereas, the Arbitrator decided the question of specific performance and the alternate relief of compensation by exceeding the terms of contract for arbitration. `A' party only claimed the relief of specific performance, but, compensation in lieu of specific performance with the same relief was granted to `C' party also and, therefore, award was not legal and proper and against the provisions of the Arbitration Agreement. We have already extracted the arbitration clause in the agreement. The Arbitrator was given the power to decide all disputes. Claim petitions and counter claims were filed and the Arbitrator correctly found that termination of the contract by the builder was illegal. Even though `A' party is entitled to specific performance in view of the distance of time, compensation was awarded and the rate of compensation claimed by `C' party was fixed at the same rate. Prima facie there is no illegality in the same. Secondly it was found that it was a bilateral agreement, but, the Arbitrator has treated it as a multi-

party dispute. There is also no basis for such a finding because agreement was bilateral. Dispute of the owners was that rescission of the contract by the builder was wrong. It is true that there were some disputes between the owners and they claimed differently, but, the claim was by owners on the one part and the builder on the other part and by agreement of parties they were classified as `A', `B' and `C'. This is reflected in the proceedings of the Arbitrator dated 16.12.2000 wherein it is specifically mentioned that all the parties agreed such a course. Therefore, that is not a ground for setting aside the award. Third ground was that builder was only a licencee and, therefore, he could not have surrendered the land. It is true that as per the memorandum of agreement till the building is completed the builder will continue as licencee. But, at the same time, General Power of Attorney executed in his favour allowed him to do as agent of the principals and allowed the builder to surrender the land also. Secondly the Arbitrator, on the basis of evidence, correctly found that the builder did not inform the owners when Government directed to surrender 10 cents of land to his convenience to amend the floor area ratio so that he can construct more and further Arbitrator also found that the real owner informed him that they are prepared to execute whatever deeds necessary for the performance of

contract. `C1' party, owner of the land, also specifically informed that he is ready to associate with the builder in all matters in fulfillment of the project. The Arbitrator correctly found that the builder himself could have surrendered the land in view of the agreement and power of attorney and apart from that the owners were also willing to do the same and he cannot insist that all of them should individually and collectively sign the agreement. Only `C1' owner had the land where 10 cents of land has to be surrendered and `C1' owner gave his intimation that he is prepared to do whatever for the performance of the contract. The land was already handed over to the builder as per agreement.

5. The District Judge also found that grant of compensation at the same rate in lieu of specific performance to `A' party and `C' party is not correct. The evidence, as rightly found by the Arbitrator, would only show that the repudiation of the contract by `B' party is illegal and against the terms of the contract and Arbitrator held that `A' party was entitled to specific performance and in view of the facts of the case compensation in lieu of specific performance. `C' party was also granted compensation in the same rate and damages because in breach of contract the contract was repudiated

by the `B' party. It is settled law that the court while setting aside the award cannot sit as an appellate court. The court cannot find fault with the reasons and reasonableness in the Arbitrator' award. Here the finding of facts entered by the Arbitrator was interfered by the District Court without jurisdiction.

6. Section 34 of the Arbitration and Conciliation Act reads as follows:

> "**34.Application for setting aside arbitral award.-**
> (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub- section(3).
> (2) An arbitral award may be set aside by the Court only if-
> (a)the party making the application furnishes proof that-
> (i)a party was under some incapacity, or
> (ii)the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it

contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or failing such agreement, was not in accordance with this Part; or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.-Without prejudice to the generality of sub-clause (ii) of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affect by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may

> entertain the application within a further period of thirty days, but not thereafter.
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> (4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

Only on the specific grounds mentioned in section 34, the award of the Arbitrator is to be set aside. The learned District Judge was of the view that in view of the decision of the Apex Court in **Oil & Natural Gas Corporation Ltd.** v. **SAW Pipes Ltd.** ((2003) 5 SCC 705) since there is illegality, it is violation of public policy and the Court can interfere in the award and set aside the award under section 34. Apex Court in the above case held that if the award is against the statutory provisions of substantive law which is in force or is passed without giving an opportunity of hearing violating mandatory procedural law, there will be patent illegality and it will affect the public policy. The court summarized the findings at paragraph 31 as follows:

> "The result would be – award could be set aside if it is contrary to:
> (a) fundamental policy of Indian law; or

> (b) the interest of India; or
> (c) justice or morality, or
> (d) in addition, if it is patently illegal.
> Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

Here, in this case, award was not contrary to fundamental policy of Indian law or interest of India or justice of morality and we have not seen prima facie illegality in the award. In any event, the award is not patently illegal or cannot be stated that it is so unfair and unreasonable that it shocks the conscience of the court. There is no illegality which goes to the root of the matter. Arbitrator acted within the jurisdiction and none of the grounds mentioned under section 34 is made out. In the above circumstances, order of the District Court in setting aside the award is set aside. With regard to the contention of the `C' party that computation of the amount by the Arbitrator was not correct, according to them, their claim regarding the computation of the compensation was not disputed by the builder and, therefore, it has to be allowed. On going through the award, it can be seen that the contention of the `C' party was that there was

breach of contract by `B' party and compensation has to be granted. That was accepted by the Arbitrator. At the same time, rate of compensation was calculated at the same rate as was given to `A' party and, therefore, when Arbitrator has taken into account the actual facts for granting compensation, as rightly held by the District Court, the court cannot interfere in it. Counter claims made by `B' party were also allowed in part.

In the above circumstances, Arbitration Appeal Nos.10 and 17 of 2003 are allowed. The impugned common order is set aside and Arbitration Appeal No.15 of 2003 is dismissed.

J.B.KOSHY
JUDGE

K.PADMANABHAN NAIR
JUDGE

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